

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

HOUDINI GRAHAM,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

Case No. 3:15-cv-05048-KLS

ORDER AFFIRMING DEFENDANT'S  
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of his applications for disability insurance and supplemental security income ("SSI") benefits. Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. After reviewing the parties' briefs and the remaining record, the Court hereby finds that for the reasons set forth below, defendant's decision to deny benefits should be affirmed.

FACTUAL AND PROCEDURAL HISTORY

On November 18, 2009, plaintiff filed an application for disability insurance benefits and another one for SSI benefits, alleging in both applications he became disabled beginning November 19, 2009. *See* Dkt. 13, Administrative Record ("AR") 15D. Both applications were denied upon initial administrative review on July 29, 2010 and on reconsideration on February 13, 2011. *See id.* A hearing was held before an administrative law judge ("ALJ") on January 31,

1 2013, at which plaintiff, represented by counsel, appeared and testified, as did two lay witnesses  
2 and a vocational expert. *See* AR 660-820.

3 In a decision dated July 15, 2013, the ALJ determined plaintiff to be not disabled. *See* AR  
4 15D-15Z. Plaintiff's request for review of the ALJ's decision was denied by the Appeals Council  
5 on November 21, 2014, making that decision the final decision of the Commissioner of Social  
6 Security (the "Commissioner"). *See* AR 7; 20 C.F.R. § 404.981, § 416.1481. On January 23,  
7 2015, plaintiff filed a complaint in this Court seeking judicial review of the Commissioner's final  
8 decision. *See* Dkt. 3. The administrative record was filed with the Court on April 10, 2015. *See*  
9 Dkt. 13. The parties have completed their briefing, and thus this matter is now ripe for the  
10 Court's review.

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12 Plaintiff argues defendant's decision to deny benefits should be reversed and remanded  
13 for further administrative proceedings because the ALJ erred: (1) in failing to follow the proper  
14 evaluation technique in finding plaintiff did not have a severe mental impairment; and (2) in  
15 failing to comply with the Commissioner's rulings in finding plaintiff to be non-compliant with  
16 recommended treatment. Plaintiff further argues that in light of these errors, the ALJ's residual  
17 functional capacity ("RFC") assessment and the hypothetical question he posed to the vocational  
18 expert at the hearing are unsupported by substantial evidence. For the reasons set forth below,  
19 however, the Court disagrees that the ALJ erred as alleged, and therefore finds that defendant's  
20 decision to deny benefits should be affirmed.  
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### 23 DISCUSSION

24 The determination of the Commissioner that a claimant is not disabled must be upheld by  
25 the Court, if the "proper legal standards" have been applied by the Commissioner, and the  
26 "substantial evidence in the record as a whole supports" that determination. *Hoffman v. Heckler*,

785 F.2d 1423, 1425 (9th Cir. 1986); *see also Batson v. Commissioner of Social Security Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004); *Carr v. Sullivan*, 772 F.Supp. 522, 525 (E.D. Wash. 1991) (“A decision supported by substantial evidence will, nevertheless, be set aside if the proper legal standards were not applied in weighing the evidence and making the decision.”) (citing *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987)).

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation omitted); *see also Batson*, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if supported by inferences reasonably drawn from the record.”). “The substantial evidence test requires that the reviewing court determine” whether the Commissioner’s decision is “supported by more than a scintilla of evidence, although less than a preponderance of the evidence is required.” *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence admits of more than one rational interpretation,” the Commissioner’s decision must be upheld. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence sufficient to support either outcome, we must affirm the decision actually made.”) (quoting *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)).<sup>1</sup>

#### I. The ALJ’s Determination of Non-Severity

Defendant employs a five-step “sequential evaluation process” to determine whether a

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<sup>1</sup> As the Ninth Circuit has further explained:

... It is immaterial that the evidence in a case would permit a different conclusion than that which the [Commissioner] reached. If the [Commissioner]’s findings are supported by substantial evidence, the courts are required to accept them. It is the function of the [Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may not try the case de novo, neither may it abdicate its traditional function of review. It must scrutinize the record as a whole to determine whether the [Commissioner]’s conclusions are rational. If they are ... they must be upheld.

*Sorenson*, 514 F.2d at 1119 n.10.

1 claimant is disabled. *See* 20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found  
2 disabled or not disabled at any particular step thereof, the disability determination is made at that  
3 step, and the sequential evaluation process ends. *See id.* At step two of the evaluation process,  
4 the ALJ must determine if an impairment is “severe.” 20 C.F.R. § 404.1520, § 416.920. An  
5 impairment is “not severe” if it does not “significantly limit” a claimant’s mental or physical  
6 abilities to do basic work activities. 20 C.F.R. § 404.1520(a)(4)(iii), (c), § 416.920(a)(4)(iii), (c);  
7 *see also* Social Security Ruling (“SSR”) 96-3p, 1996 WL 374181 \*1. Basic work activities are  
8 those “abilities and aptitudes necessary to do most jobs.” 20 C.F.R. § 404.1521(b), § 416.921(b);  
9 SSR 85- 28, 1985 WL 56856 \*3.  
10

11 An impairment is not severe only if the evidence establishes a slight abnormality that has  
12 “no more than a minimal effect on an individual[’]s ability to work.” SSR 85-28, 1985 WL  
13 56856 \*3; *see also Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); *Yuckert v. Bowen*, 841  
14 F.2d 303, 306 (9th Cir.1988). Plaintiff has the burden of proving that his “impairments or their  
15 symptoms affect [his] ability to perform basic work activities.” *Edlund v. Massanari*, 253 F.3d  
16 1152, 1159-60 (9th Cir. 2001); *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1998). The step two  
17 inquiry described above, however, is a *de minimis* screening device used to dispose of groundless  
18 claims. *See Smolen*, 80 F.3d at 1290.  
19

20 The ALJ in this case found that while there were allegations of mental impairments, the  
21 objective evidence in the record did not support the existence of a medically determinable mental  
22 impairment. *See* AR 15P-15Q. Plaintiff argues that in so finding the ALJ erred by not following  
23 the proper prescribed technique for making that determination. The Court disagrees.  
24

25 To evaluate the severity of a claimant’s mental impairments at step two of the sequential  
26 disability evaluation process, the Commissioner must “follow a special technique at each level in

1 the administrative review process,” including “[a]t the administrative law judge hearing” level.  
2 20 C.F.R. § 404.1520a(a), (e) § 416.920a(a), (e). Under this technique, the Commissioner first  
3 determines whether the claimant has a medically determinable impairment. *See* 20 C.F.R. §  
4 404.1520a(b)(1), § 416.920a(b)(1). If the claimant does have a medically determinable  
5 impairment, then the Commissioner must rate the “degree of functional limitation” resulting  
6 therefrom.<sup>2</sup> 20 C.F.R. § 404.1520a(b), § 416.920a(b).

7  
8 At the initial and reconsideration levels of the administrative review process, “a standard  
9 document” is completed to record how the above special technique was applied. 20 C.F.R. §  
10 404.1520a(e), § 416.920a(e). At the ALJ hearing level, documentation of the technique is done  
11 in the decision itself. *Id.* As plaintiff points out, the ALJ did not expressly document this  
12 technique in his decision even though, as noted above, he was required to do so. *See* AR 15N-  
13 15Q; *Keyser v. Commissioner Social Security Admin.*, 648 F.3d 721, 726 (9th Cir. 2011) (finding  
14 ALJ erred in part due to failure to document application of technique). Failure to document the  
15 technique by the ALJ, however, “does not require reversal in situations where there is no viable  
16 claim of mental impairment.” *Gutierrez v. Apfel*, 199 F.3d 1048, 1051 (9th Cir. 2000) (pointing  
17 out that documentation of special technique “would not necessarily be material to a disability  
18 claim based, for example, predominately on a shoulder injury, even if a claimant alleged a minor  
19 nonexertional impairment such as controllable alcohol abuse”).

20  
21 Documentation of the special technique, accordingly, is required only “where there is a  
22 colorable claim of mental impairment.” *Gutierrez*, 199 F.3d at 1051; *see also Keyser*, 648 F.3d at  
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25 <sup>2</sup> Rating the degree of functional limitation involves consideration of four functional areas: activities of daily living;  
26 social functioning; concentration, persistence or pace; and episodes of decompensation. *See* 20 C.F.R. §  
404.1520a(c), § 416.920a(c). If a claimant’s degree of limitation in the first three areas is rated “none” or “mild” and  
“none” in the fourth area, then the claimant’s mental impairment generally is considered not severe, unless evidence  
in the record otherwise indicates there is more than a minimal limitation in the claimant’s ability to do basic work  
activities. 20 C.F.R. § 404.1520a(d)(1), § 404.1520a(d)(1).

1 726 (ALJ's failure to comply with 20 C.F.R. § 404.1520a not harmless if claimant has colorable  
2 claim of mental impairment). Where a claimant fails to establish the existence of a medically  
3 determinable impairment, he or she also necessarily fails to establish a colorable claim of mental  
4 impairment. *See Coleman v. Colvin*, 524 F. Appx. 325, 326 (9th Cir. 2013).

5 A medically determinable mental impairment "must result from . . . psychological  
6 abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic  
7 techniques," and "must be established by medical evidence consisting of signs, symptoms, and  
8 laboratory findings, not only by [the claimant's] statement of symptoms." 20 C.F.R. § 404.1508,  
9 § 416.908; *see also* 20 C.F.R. § 404.1527a(b)(1), § 416.927a(b)(1); *Coleman*, 524 F. App'x at  
10 326 (upholding determination of ALJ that claimant failed to establish medically determinable  
11 mental impairment, because she "failed to present any evidence of signs or laboratory findings  
12 establishing that [she] suffered from a mental impairment").  
13

14 Plaintiff argues he has presented a colorable claim of mental impairment requiring the  
15 ALJ to apply the special technique, because that claim is not "wholly insubstantial, immaterial,  
16 or frivolous." Dkt. 17, p. 6 (citing *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987) (finding  
17 plaintiff's due process claim to be colorable as it raised "a serious constitutional challenge" and  
18 was "not insubstantial, immaterial, or frivolous")). Specifically, plaintiff points to the evaluation  
19 report of Cassandra Clark, Ph.D., who found him to have moderate to severe limitations in  
20 several areas of social functioning based on a number of mental health diagnoses (*see* AR 524-  
21 25), as well as that of Robert Parker, Ph.D., who also found plaintiff to be moderately to severely  
22 limited in terms of both cognitive and social functioning similarly based on a number of mental  
23 health diagnoses (*see* AR 432-33).  
24

25 The ALJ found that with the exception of the diagnosis of malingering Dr. Clark offered,  
26

1 there was no objective medical basis for the other diagnoses Dr. Clark and Dr. Parker made, but  
2 instead they were based on plaintiff's self-reported symptoms and subjective complaints, which  
3 the ALJ found lacked credibility. *See* AR 15P-15Q. An ALJ may reject a medical source's  
4 opinion "if it is based 'to a large extent' on a claimant's self-reports that have been properly  
5 discounted as incredible." *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (quoting  
6 *Morgan*, 169 F.3d 595, 602 (9th Cir.1999)). Plaintiff does not argue the ALJ erred in finding he  
7 lacked credibility overall concerning those symptoms and complaints, but rather asserts the ALJ  
8 erred in finding Dr. Clark and Dr. Parker over-relied on his self-reporting.  
9

10       It is true that "an ALJ does not provide clear and convincing reasons for rejecting an  
11 examining physician's opinion by questioning the credibility of the [claimant's] complaints  
12 where the [physician] does not discredit those complaints and supports his ultimate opinion with  
13 his own observations." *Ryan v. Commissioner of Social Security*, 528 F.3d 1194 (9th Cir. 2008).  
14 Except for the observation that plaintiff had pressured speech, though, all of the other findings  
15 Dr. Clark reported either clearly were based on plaintiff's self-reporting or were susceptible to  
16 being manipulated by him. *See* AR 523-30; *Ukolov v. Barnhart*, 420 F.3d 1002, 1006 (9th Cir.  
17 2005) (stating that portions of physician's records where claimant's subjective complaints were  
18 noted "do not support a finding of impairment because they are based solely on [his] own  
19 'perception or description' of his problems," and that positive Romberg test did not sufficiently  
20 bolster that claimant's claimed impairment because it was "susceptible to subject manipulation,"  
21 as he could "control the extent of his unsteadiness"). The same is true with respect to the clinical  
22 findings reported by Dr. Parker. *See* AR 431-38.  
23  
24

25       This determination is bolstered by the clear evidence of malingering Dr. Clark observed  
26 on the part of plaintiff. *See* AR 525 (reporting that cognitive testing was "discontinued because

1 he was so blatantly malingering,” resulting in “[n]o cognitive ratings” being given). In addition,  
2 although Dr. Clark noted that plaintiff’s “lack of effort” occurred on the cognitive portion of the  
3 evaluation and specifically offered a diagnosis of malingering in regard thereto (AR 524, 526),  
4 she also expressly stated that such lack of effort on that portion of the evaluation “render[ed] the  
5 other areas [of the evaluation] suspect” as well (AR 526). This over reliance on plaintiff’s own  
6 discredited self-reporting thus distinguishes it from *Keyser* and *Gutierrez*, where there was no  
7 indication that the same credibility issues were present. *See* 648 F.3d at 723-26; 199 F.3d at  
8 1050-51.<sup>3</sup> Accordingly, the ALJ did not err in finding plaintiff had no medically determinable  
9 mental impairment without first applying the special technique, as plaintiff has not established  
10 the existence of a colorable claim of mental impairment.

11  
12 II. The ALJ’s Finding of Non-compliance

13 The ALJ discounted plaintiff’s credibility in part based on his failure to follow prescribed  
14 treatment for his uncontrolled hypertension. *See* AR 15S-15T. Failure to assert a good reason for  
15 not seeking, or following a prescribed course of, treatment “can cast doubt on the sincerity of the  
16 claimant’s pain testimony.” *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Plaintiff argues  
17 the ALJ erred in so finding, because he did not comply with the requirements of Social Security  
18 Ruling (“SSR”) 82-59, which provides that particular care should be taken to look into the  
19 reasons why a claimant is noncompliant – including re-contacting the claimant’s treating sources  
20 – before making a finding of non-disability based on noncompliance. 1982 WL 31384, at \*2-\*3.  
21 But as pointed out by defendant, SSR 82-59 applies only where the claimant is first found to be  
22 disabled. *See* 1982 WL 31384, at \*1 (“An individual who would otherwise be found to be under  
23 a disability, but who fails without justifiable cause to follow treatment prescribed by a treating  
24 a disability, but who fails without justifiable cause to follow treatment prescribed by a treating  
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<sup>3</sup> The same is true with respect to the Ninth Circuit’s decision in *Angevine v. Colvin*, 542 Fed. Appx. 589 (9th Cir. 2013), cited in plaintiff’s reply brief.

1 source which . . . can be expected to restore the individual's ability to work, cannot by virtue of  
2 such 'failure' be found to be under a disability.").

3 Plaintiff protests that such a reading of SSR 82-59 "sounds unduly technical." Dkt.21, p.  
4 5. Be that as it may, this is what that ruling expressly provides. As such, the Court shall abide by  
5 its provisions. *See Chavez v. Department of Health and Human Services*, 103 F.3d 849, 851 (9th  
6 Cir. 1996) (noting that SSRs "constitute the Social Security Administration's interpretations of  
7 the statute it administers and of its own regulations," and that although they "are interpretative  
8 rulings and do not have the force of law," courts are to defer to them "unless they are plainly  
9 erroneous or inconsistent with the [Social Security] Act or regulations."). Given that plaintiff has  
10 not shown the requirements of SSR 82-59 are "plainly erroneous or inconsistent" with the Social  
11 Security Act, he has offered no basis for declining to apply them in this case.<sup>4</sup>

### 12 CONCLUSION

13  
14 Based on the foregoing discussion, the Court hereby finds the ALJ properly concluded  
15 plaintiff was not disabled. Accordingly, defendant's decision to deny benefits is AFFIRMED.  
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17 DATED this 8th day of September, 2015.

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21 Karen L. Strombom  
22 United States Magistrate Judge  
23

24  
25 <sup>4</sup> Plaintiff also appears to argue that the ALJ did not adequately take into consideration his claim of being unable to  
26 afford his blood pressure medication as a reason for not complying with recommended treatment in discounting his  
credibility. *See Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995) (benefits may not be denied because of failure to  
obtain treatment due to inability to afford it). Even if it can be said the ALJ erred in failing to do so, again as pointed  
out by defendant, the ALJ also offered other reasons for discounting plaintiff's credibility, including the evidence of  
malingering in the record, none of which plaintiff has challenged. *See* AR 15L-15Q.